Missouri's Postconviction Pleading & Case Requirements

by Greg Mermelstein, November 2000

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I. Pleading Requirements For The Beginner

Step One: Plead Both Federal And State Constitutional Provisions

It is important to plead all applicable federal and state constitutional provisions. If you fail to plead a federal constitutional provision, your client will be barred from proceeding in federal court. While postconviction claims involve more than just "effective assistance of counsel," that claim is by far the most common. Hence, most postconviction claims will arise under the Sixth Amendment (right to effective assistance of counsel), as made applicable to the states through the Due Process Clause of the Fourteenth Amendment.

Step Two: Plead Under Strickland or Hill

The actual pleading requirements will vary depending on whether you are challenging a guilty plea or a trial, and will also vary depending on the type of legal claim being raised. That said, however, in general, you **must plead two elements**:

(1) That counsel's performance fell below the standard of customary skill and diligence, i.e., that counsel's performance was unreasonable because counsel did something or failed to do something,

AND

(2) That the movant was "prejudiced" as a result because:

(a) in the case of a trial, there is a reasonable probability the outcome of the trial would have been different (had counsel not acted as he did or not failed to act);

OR

(b) in the case of a guilty plea, the movant would not have pleaded guilty but would have gone to trial (had counsel not acted as he did or failed to act).

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Holds: That in order to prevail on a claim of ineffective assistance of counsel, movant must show (1) that attorney's performance fell below the standard of reasonably effective assistance; and (2) that movant was "prejudiced" as a result, i.e., that there is a reasonable probability that the result of the proceedings would have been different, but for counsel's deficient performance.

Relevant quotes:

"[T]he proper standard for attorney performance is that of reasonably effective assistance...[A] guilty plea cannot be attacked as based on inadequate legal advice unless

counsel was not a 'reasonably competent attorney' and the advice was not 'within the range of competence demanded of attorneys in criminal cases.'...[T]he defendant must show that counsel's representation fell below an objective standard of reasonableness....The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." 466 U.S. at 687-88.

"Counsel...has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." 466 U.S. at 688.

"Even if a defendant shows that particular errors of counsel were unreasonable...the defendant must show that they actually had an adverse effect on the defense....[W]e believe that a defendant need **not** show that counsel's deficient conduct more likely than not altered the outcome in the case....The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome. Accordingly, the appropriate test for prejudice finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution....The defendant must show that there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." 466 U.S. at 693-94.

Caveat:

While the above-stated standard of prejudice is the one most commonly encountered in postconviction, it is also the most difficult legal standard for a movant to meet. Therefore, as will be discussed in the "advanced" portion of this handout, it is better wherever possible to plead a claim that avoids this hard-to-meet standard, or at least pleads this Strickland test only in the alternative to an easier-to-meet test.

For example, prejudice is presumed where there is an actual or constructive denial of the assistance of counsel, or where the state has interfered with counsel's assistance. 466 U.S. at 692, citing, United States v.Chronic, 466 U.S. 648, 659 and n. 25, 104 S.Ct. 2039, 2046-47 and n. 25 (1984). Thus, where possible, one should try to plead a claim as an actual or constructive denial of counsel, or as state interference with counsel, because such claims have an easier burden for a movant to meet.

Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

Holds: That in order to prevail on a claim of ineffective assistance of counsel following a guilty plea, movant must show that the guilty plea was not voluntary, knowing and/or intelligent because (1) counsel's representation fell below objective standard of reasonableness; and (2) movant was "prejudiced" as a result, i.e., that there is a reasonable probability that, but for counsel's errors, movant would not have pleaded guilty and would have insisted on going to trial.

Relevant quotes:

"The longstanding test for determining the validity of a guilty plea is 'whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.'...[P]etitioner relies...on the claim that his plea was 'involuntary' as a result of ineffective assistance of counsel....Where, as here, a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases.'" 474 U.S. at 56.

" '[W]hen a convicted defendant complains of the ineffective assistance of counsel, the defendant must show that counsel's representation fell below an objective standard of reasonableness.'" 474 U.S. at 57.

"We hold...that the two-part Strickland v. Washington test applies to challenges to guilty pleas based upon ineffective assistance of counsel. In the context of guilty pleas, the first half of the Strickland v. Washington test is [whether counsel's performance fell below an objective standard of reasonableness]....The second, or 'prejudice' requirement, ... focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. In other words, in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." 474 U.S. at 58-59.

Missouri has expressly adopted these United States Supreme Court cases:

Sanders v. State, 738 S.W.2d 856 (Mo. banc 1987).

Holds: In order to prevail on a claim of ineffective assistance of counsel after trial, a movant must show (1) that his attorney failed to exercise the customary skill and diligence that a reasonably competent attorney would have exercised under similar circumstances; and (2) that the movant was prejudiced thereby. Id. at 857, citing, Strickland v. Washington.

McVay v. State, 12 S.W.3d 370 (Mo. App., S.D. 2000).

Holds: In order to prevail on a claim of ineffective assistance of counsel after a guilty plea, a movant must show (1) that counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would exercise under similar circumstances; and (2) that movant was prejudiced, i.e., that there is a reasonable probability that, but for counsel's errors, movant would not have pleaded guilty and would have insisted on going to trial. Id. at 373, citing Strickland v. Washington and Hill v. Lockhart.

These Strickland and Hill standards are "magic words" in postconviction, and you must use the "magic words" or else your pleading will be deemed insufficient. It is advisable to track the language in Strickland and Hill as much as possible in writing the pleading.

Example of a post-trial pleading:

"Movant was denied effective assistance of counsel and due process of law in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution because counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would have exercised under similar circumstances in that [explain what counsel failed to do]. Movant was prejudiced as a result, because there is a reasonable probability that the outcome of the trial would have been different in that [explain how counsel's failure to act affected the result of the proceeding or undermines confidence in the outcome of the trial]."

Example of post-guilty plea pleading:

"Movant was denied effective assistance of counsel and due process of law in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution because counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would have exercised under similar circumstances in that [explain what counsel failed to do.] Movant's guilty plea was rendered involuntary, unknowing and/or unintelligent by counsel's failure to act. Movant was prejudiced as a result because movant would not have pleaded guilty and would have insisted on going to trial had counsel not failed to act in that [explain why movant would have done this].

Step Three: Plead Facts, Not Conclusions

The often-stated rule in Missouri is that Missouri is a "fact-pleading" state, not a "notice state." Hence, one must plead very specific facts in an Amended Motion in order to sufficiently state a claim and be entitled to an evidentiary hearing.

For example, McVay v. State, 12 S.W.3d 370, 372 (Mo. App., S.D. 2000) states (1) the motion must alleges facts, not conclusions, warranting relief; (2) the facts alleged must raise matters not refuted by the record in the case; and (3) the matters complained of must have resulted in prejudiced to the movant.

For some claims, such as failure to call witnesses (discussed below in this handout), there are specific facts which must be alleged to properly plead a failure to call witnesses claim.

In the absence of a pleading formula, as a general rule, one should set out as much factual detail as possible to support the claim one is asserting. The best way to conceptualize claims is to start with the legal standard one is trying to meet, then ask, "What facts do I need to prove to meet that legal standard?" Plead those facts in as much detail as you can. Think about the witnesses who will be called at an evidentiary hearing and plead exactly what you expect those witness to say. Think about the evidentiary documents (police reports, records, etc.) that you will be presenting at an evidentiary hearing and plead exactly what those say.

See the examples section of this handout for a variety of factually pleaded claims.

Step Four: Include Some Legal Analysis

Although the primary goal in drafting an Amended Motion is to plead facts, one must also include some legal analysis in order to have an adequately drafted pleading. While the amount of analysis may be less than one might have in an appellate brief, Missouri does require some law be cited for the claim one is raising. Thus, one should cite a case, statute or constitutional provision to support the claim one is raising.

State v. Shafer, 969 S.W.2d 719, 738 (Mo. banc 1998).

Holds: Where movant alleged only the *fact* that he was denied a presentence investigation, this was insufficient to plead a claim because there was not pleaded any "explanation of the factual or *legal* prejudice that follows....[Movant] does no more than state the fact that no presentence investigation occurred....[Movant's] *pleadings are devoid of any assertion that he has a constitutional or statutory right to a presentence investigation*, and he states no facts showing what a presentence investigation would have revealed" (emphasis added).

Step Five: Follow The Format Of "Form 40"

The Amended Motion filed on your client's behalf must be substantially in the form of "Form 40," or else it will be dismissed. State v. Owsley, 959 S.W.2d 789, 797 (Mo. banc. 1997).

The safest course of action is to exactly track the format of "Form 40" in writing your pleading.

In other words, "claims" should be listed in a Paragraph 8 and "facts in support" in a corresponding Paragraph 9. In lengthy motions, it makes sense to give claims heading or titles to avoid confusion. Examples follow in the examples section of this handout.

The remaining sections of "Form 40" should be typed exactly as they appear on "Form 40" and the questions answered.

An example of a complete Amended Motion appears as "Example One" in the examples portion of this handout.

II. For The Beginner & The Advanced: Pleading A Failure To Call Witness Claim -- Use The Magic Words

It is important to remember that there are more postconviction claims available than "failure to investigate and call witnesses." That said, however, "failure to investigate and call witnesses" is probably the most common postconviction claim.

Missouri has very detailed requirements for what must be pleaded in order to properly raise such a claim. These pleading requirement are mandatory. They are truly "magic words," and it is essential to use them in all postconviction claims regarding failure to call witnesses.

Among the most recent cases setting forth the mandatory requirements for pleading a failure to call witnesses claim is Morrow v. State, 21 S.W.3d 819 (Mo. banc 2000).

Morrow holds that in order to properly state a claim for failure to investigate and call witnesses, a movant **MUST** plead:

1. Who the witness was;
2. What the testimony of the particular witness would have been;
3. That counsel was informed of the existence of the witness and how to contact the witness, **OR** that such information was readily available through reasonable investigation and how such information would have been discovered in the course of reasonable investigation;
4. That the witness would have testified if called, that is, that the witness was ready and available to testify if called.

Additional facts that should be pleaded (if true):

1. That movant asked counsel to call the witness.

Relevant quotes:

"[Movant] must specifically identify who the witnesses were, what their testimony would have been, whether or not counsel was informed of their existence, and whether or not they were available to testify." 21 S.W3d at 823

"[Movant's pleadings are defective because movant] did not allege that any listed witness was available to testify or that the witness would have testified if he or she had been called to do so. [Movant] did not connect a specific portion of [movant's pleading narrative] to a particular witness. It is impossible, therefore, to determine whether any of the individual witnesses would have provided [certain] evidence through their testimony." 21 S.W.3d at 823

"[Movant's] pleadings were deficient in other respects....[A] movant must also allege that he provided trial counsel with pertinent and sufficient information regarding how to

contact potential witnesses, or that such information was readily available....[Movant's] motion did not allege that he provided trial counsel with names or other information that reasonable counsel could have used to discover the facts and witnesses listed in [movant's] motion. [Movant] did not allege that a reasonably competent attorney, in the course of a reasonable investigation, should have discovered the facts and witnesses listed in [movant's] motion....[Movant] failed to allege whether the witnesses were available to testify, would have testified if available, and whether trial counsel was informed of their existence." 21 S.W.3d at 824.

Example Of A Well Pleaded Failure To Call Witness Claim:

While there is no single way to plead a claim based on the above mandatory requirements, below is one example using the format of "Form 40." Note that the claim uses the "magic words" set out in Morrow, and also includes legal analysis, by citing to a controlling case. Note also the specific factual detail throughout the claim

[Claim appears on next page.].

8(A) Ineffective Assistance Of Counsel: Failure To Call Alibi Witness

Movant was denied effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution in that movant's trial counsel failed to investigate and call Clay Maxwell. Counsel knew or should have known of Maxwell, and could have located him through reasonable investigation, because there was a pretrial police report on Maxwell which counsel had in his possession, and which contained Maxwell's name and address. Counsel failed to investigate and call Maxwell to testify. Maxwell would have testified if he had been subpoenaed and called by counsel, and his testimony would have provided a viable defense. Maxwell would have testified that at the time of the charged robbery at McDonald's, movant was not at the McDonald's but instead was in class at Rock Bridge High School, more than two miles away. Movant was prejudiced as a result, because there is a reasonable probability that the outcome of trial would have been different, in that the jury heard no evidence at trial to show that movant was not at the McDonald's when it was robbed by a masked gunman. State v. Butler, 951 S.W.2d 600, 608-10 (Mo. banc 1997)(failure to investigate, develop and introduce evidence that another person committed the offense constitutes ineffective assistance of counsel.)

9(A) Movant will rely on the following evidence and witnesses in support of Claim 8(A):

1. **Clay Maxwell, 1400 West Broadway, Columbia, MO 65201.** Maxwell would have testified at trial, and will testify in this Rule 29.15 case, that on October 15, 1999, the date of the robbery of McDonald's, Maxwell was a math teacher at Rock Bridge High School in Columbia; that the school is two miles from McDonald's; and that at the time of the robbery, 2:00 p.m on October 15, movant was in Maxwell's math class taking an algebra exam, and could not have been at the McDonald's.

Additionally, Maxwell will testify in this Rule 29.15 case that he would have been ready and available to testify at trial if he had been subpoenaed to testify; that he was not contacted by or subpoenaed by trial counsel; and that trial counsel did not call him to testify.

2. **John Doe, 3402 Buttonwood, Columbia, MO 65201.** Doe will testify that he represented movant at trial; that he had in his possession a police report, No. 177996, regarding an interview with Clay Maxwell, which contained Maxwell's name and address; that Doe failed to investigate, contact and interview Maxwell; and that Doe's failure to do this was not trial strategy, but was because Doe erroneously forgot about Maxwell after reading the initial discovery.

3. **Columbia Police Department Report, No. 177996.** Such report will show that on October 20, 1999, the Columbia Police Department conducted an interview with Clay Maxwell; that the report included Maxwell's name and address; that Maxwell told police that on October 15, 1999, Maxwell was a math teacher at Rock Bridge High School in Columbia; that the school is two miles from McDonald's; and that at the time of the robbery, 2:00 p.m on October 15, movant was in Maxwell's math class taking an algebra exam, and could not have been at the McDonald's.

III. For The Advanced: Pleading Based On Ease Of Proof [1]

The concept of "pleading based on ease of proof" is based on the idea that you should plead claims based on how easy they are to prove and win. In other words, if there are multiple ways to plead a claim, the claim should first be pleaded in the manner which is easiest to prove and win, and only in the alternative pleaded under a more difficult-to-meet standard.

Significantly, the Strickland standard is the hardest for a movant to prove and win in postconviction, even though it is the standard most commonly pleaded by movants' attorneys. This suggests that many of us are pleading incorrectly and need to re-think how we raise postconviction claims. Why are we making our burden more difficult?

"Advanced pleaders" know how to break free of Strickland's heavy burden, and plead claims under easier-to-meet standards.

Some of the following materials may apply only in federal habeas corpus. But many of the ideas expressed in the materials can be incorporated into our State postconviction practice.

Caveat by Greg Mermelstein:

In my (Greg Mermelstein's) personal view, many courts may not understand the concept of "advanced pleading." I believe that many courts -- and prosecutors -- erroneously believe that postconviction claims are limited to pleading claims arising under Strickland. For this reason, I would be reluctant to plead a claim based entirely on some easier-to-meet standard. Instead, for advanced pleaders, I recommend pleading a claim primarily under the easier-to-meet standard, but in the alternative, plead it also as a Strickland violation. That way all the bases are covered.

I realize that the disadvantage to such an alternative pleading approach is that the court may simply decide the case under the more familiar Strickland standard and ignore the easier-to-meet standard, but I believe alternative pleading may prove "safer" for clients in many cases.

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[1] I have taken the material in this section from "Pleading Prejudice In Capital Habeas Corpus Proceedings: A Publication Of The Habeas Assistance And Training Counsel" by John H. Blume, Mark E. Olive and Denise Young.

Five Categories Of Postconviction Claims

There are five categories of claims that can be raised in postconviction, from easiest to prove to most difficult to prove. Category I claims are the easiest to prove and win. Category V claims are the most difficult.

Category I: **If the movant shows a constitutional violation, the court will either require no showing of prejudice or will presume prejudice requiring relief.**

Category II: **If the movant shows a constitutional violation and some minimal quantum of prejudice, the court will grant relief.**

Category III: **If the movant shows a constitutional violation, the court will grant relief unless the State proves the error was harmless beyond a reasonable doubt.**

Category IV: **The court will grant relief if the movant shows constitutional error that had a substantial or injurious effect or influence in determining the jury's verdict.**

Category V: **The court will grant relief if the movant shows a constitutional violation and a reasonable probability that, but for the error, the result of the proceeding would have been different, where "reasonable probability" is defined as a probability sufficient to undermine confidence in the outcome.**

Category I: If the movant shows a constitutional violation, the court will either require no showing of prejudice or will presume prejudice requiring relief.

1. Incompetence of client
   a. Incompetent to stand trial
   b. State court failed to conduct a competency hearing

2. Conflict of Interest

3. Biased judge or juror

4. Functionally absent or helpless counsel

5. Right to public trial

6. Forced administration of psychotropic medication

7. Denial of right to self-representation

8. Denial of right to counsel

9. Invalid guilty plea

10. Race Claims & Sex Claims
    a. Underrepresentation In The Grand And Petit Jury
       (1) "Fair Cross Section" Requirement
       (2) The Equal Protection Clause
       (3) Extent of Underrepresentation
    b. Discrimination in selection of grand jury foreman
    c. Discriminatory Use of Peremptory Challenges
    d. Racial Animus Of Decision-Makers

11. Trial in a prejudicial atmosphere

12. Witherspoon error

13. Shackling

14. Cage error

15. Lying during voir dire and jury misconduct

16. Denial of tools to construct a defense

Category II: If the movant shows a constitutional violation and some minimal quantum of prejudice, the court will grant relief.

1. The Knowing Use Of False Evidence

2. Actual Conflict of Interest

Category III: If the movant shows a constitutional violation, the court will grant relief unless the State proves the error was harmless beyond a reasonable doubt.

1. The Chapman standard generally

2. Massiah Claims

3. Juror Claims

4. Right to testify

5. Prior convictions and Johnson v. Mississippi

6. Confessions

Category IV: The court will grant relief if the movant shows constitutional error that had a substantial and injurious effect or influence in determining the jury's verdict.

Category V: The court will grant relief if the movant shows a constitutional violation and a reasonable probability that, but for the error, the result of the proceeding would have been different, where "reasonable probability" is defined as a probability sufficient to undermine confidence in the outcome.

1. Ineffective assistance of counsel -- Strickland

2. Brady Claims

Category I: If the movant shows a constitutional violation, the court will either require no showing of prejudice or will presume prejudice requiring relief.

1. Incompetence of client

a. Incompetent to stand trial

The Due Process Clause of the Fourteenth Amendment prohibits the States from trying and convicting a mentally incompetent defendant. Dusky v. United States, 362 U.S. 402 (1960). The elements of incompetency at the pleading stage include (1) clear and convincing evidence raising a substantial doubt as to competency to stand trial in that (b) the movant could not consult with trial counsel with a reasonable degree of rational understanding, and (c) the movant did not have a rational as well as factual understanding of the proceedings. Id. Upon such proof, movant is entitled to a new trial without a showing of prejudice.

b. State court failed to conduct a competency hearing

The Due Process right to a fair trial is violated if the trial court (a) fails to hold a competency hearing (b) once there arises a "bona fide" or "sufficient doubt" of the defendant's competency to stand trial. Drope v. Missouri, 420 U.S. 162, 179 (1975); Pate v. Robinson, 383 U.S. 375 (1966). Because of the difficulty of retrospectively determining trial competence, harmless error analysis is not appropriate on direct review, Drope, 420 U.S. at 183, or on habeas, Pate, 388 U.S. at 387.

2. Conflict of Interest

When (a) counsel represents multiple defendants, (b) counsel or a defendant objects to the multiple representation and/or seeks appointment of separate counsel, and (c) trial court fails to appoint separate counsel and/or fails to adequately inquire into the possibility of conflict, prejudice is presumed and reversal is automatic. Wood v. Georgia, 450 U.S. 261 (1981); Holloway v. Arkansas, 435 U.S. 475 (1979); United States v. Levy, 25 F.3d 146 (2nd Cir. 1994); Selsor v. Kaiser, 22 F.3d 1029, 1032-33 (10th Cir. 1994).

3. Biased judge or juror

When a trial and/or sentencing judge, or juror, is biased against a defendant, the due process right to an impartial and disinterested tribunal is violated and reversal is automatic. Porter v. Singletary, 49 F.3d 1483, 1489 (11th Cir. 1995); Johnson v. United States, 117 S.Ct. 1544, 1550 (1997); Arizona v. Fulminante, 499 U.S. 279, 309-310 (1991); Smith v. Phillips, 455 U.S. 209, 222 (1982)(O'Connor, J.., concurring); Leonard v. United States, 378 U.S. 544 (1964); Tuney v. Ohio, 273 U.S. 510 (1927); Walberg v. Israel, 766 F.2d 1071, 1078 (7th Cir. 1985).

4. Functionally absent or helpless counsel

If counsel is absent at a critical stage, or if counsel is present, but *functionally* absent at a critical stage, the Sixth Amendment is violated and reversal is automatic. Strickland v. Washington, 466 U.S. 668, 692 (1984); Penson v. Ohio, 488 U.S. 75, 88 (1988); Evitts v. Lucy, 469 U.S. 387, 396 (1985); Holloway v. Arkansas, 435 U.S. 475, 490 (1978).

If counsel is present and trying to assist, but actions from the court or prosecution or other state agent make it impossible for counsel to act as an advocate, the Sixth Amendment is violated and prejudice is also presumed. United States v. Chronic, 466 U.S. 648, 659-660 (1984).

5. Right to public trial

Defendant is entitled to a public trial, which can only be closed to the public under certain strict enumerated circumstances; if these circumstances are not show, reversal is automatic. Waller v. Georgia, 467 U.S. 39 (1984); Johnson v. United States, 117 S.Ct. 1544, 1550 (1997).

6. Forced administration of psychotropic medication

Forced administration of psychotropic medication of a defendant prior to trial is impermissible under the Due Process clause absent a finding of overriding justification and determination of medical appropriateness. Medications' side-effects may have impacted a defendant's outward appearance, content of testimony, ability to follow proceedings, or substance of communications with counsel. No showing of prejudice is required. Riggins v. Nevada, 504 U.S. 127, 137 (1992).

7. Denial of right to self-representation

A defendant has a Sixth Amendment right to self-representation. When defendant invokes that right knowingly and intelligently, unequivocally, in a timely manner, and not for purposes of delay, then reversal is automatic if the request is not honored. Johnson v. United States, 117 S.Ct. 1544, 1550 (1997); Arizona v. Fulminante, 499 U.S. 279 (1991); Faretta v. California, 422 U.S. 806 (1975); Peters v. Gunn, 33 F.3d 1190, 1193 (9th Cir. 1994).

8. Denial of right to counsel

A defendant does not waive his right to counsel unless he does so knowingly, intelligently, and voluntarily; unequivocally; and after a comprehensive and penetrating inquiry by the court regarding the dangers and disadvantages of self-representation. Faretta v. California, 422 U.S. 806, 835 (1975). The denial of counsel at a critical stage of a state criminal proceeding requires automatic reversal. Johnson v. United States, 117 S.Ct. 1544, 1550 (1997).

Missouri Cases: State v. Watson, 687 S.W.2d 667 (Mo. App., E.D. 1985); State v. Wilson, 816 S.W.2d 301 (Mo. App., S.D. 1991).

9. Invalid guilty plea

If the record of the guilty plea does not unequivocally disclose (a) that the trial judge spread on the record that the defendant had a full understanding of what the guilty plea meant and its consequences, and (b) that the defendant was aware of and knowingly and intelligently and voluntarily waived the rights to cross-examine witnesses, call witnesses, testify or not, be tried by a jury of peers, etc., then the plea is invalid and violates due process. Boykin v. Alabama, 395 U.S. 238 (1969); McCarthy v. United States, 394 U.S. 459, 467 (1969). An invalid guilty plea is not subject to harmless error analysis.

Missouri Cases or Rules: Missouri courts must follow list of requirements under Rule 24.02 in accepting a guilty plea.

There must also be a factual basis for the plea. Jones v. State, 758 S.W.2d 153 (Mo. App., E.D. 1988); Section 600.051.2(1) RSMo.; Rule 24.02(e).

10. Race Claims & Sex Claims

Although most cases concern race issues, under-representation of women may also state a constitutional violation. Taylor v. Louisiana, 419 U.S. 522, 531 (1975).

a. Underrepresentation In The Grand And Petit Jury

(1) "Fair Cross Section" Requirement

The Sixth Amendment provides that the panels from which grand and petit jurors are chosen must be draw from a fair cross section of the community. Duren v. Missouri, 439 U.S. 357 (1979); Taylor v. Louisiana, 419 U.S. 522, 527 (1975); Atwell v. Blackburn, 800 F.2d 502 (5th Cir. 1986). If racial discrimination occurs in process of selecting grand or petit jury, conviction must be reversed even with overwhelming evidence of guilt. Vasquez v. Hillery, 474 U.S. 254, 260 (1986).

The movant need not show an intent to discriminate in selection of jurors, only "systematic exclusion." Alston v. Manson, 791 F.2d 255, 258 (2d Cir. 1986). However, some courts have begun to question this, United States v. Biaggi, 909 F.2d 662, 677 n. 4 (2d Cir. 1990), and the better course of action would be to investigate and allege intentional discrimination even in the context of a fair cross-section claim.

Missouri statute: Missouri may require "randomness" in selecting grand and petit jurors. Section 494.400 et seq. RSMo.

(2) The Equal Protection Clause

The Fourteenth Amendment prohibits selection of the grand jury venire (that is, the panel from which the grand jury is eventually chosen) in a discriminatory manner which gives rise to disproportionately unrepresentative results. Caseneda v. Partida, 430 U.S. 482, 494 (1977); Johnson v. United States, 117 S.Ct. 1544, 1550 (1997).

Unlike the Sixth Amendment, the accused must show that the State intended to discriminate. Duren v. Missouri, 439 U.S. at 368 n. 26.

(3) Extent of Underrepresentation

Under both the Sixth and Fourteenth Amendments, movant must show a disparity of at least 10%. That is, the group's representation in the grand or petit jury process must be at least 10% less than the group's representation in the community. United States ex rel. Barksdale v. Blackburn, 610 F.2d 253, 264 (5th Cir. 1980).

"Absolute disparity" is only one measure of under-representation. Some courts use "relative disparity." The difference can be critical, since absolute disparity may mask the true extent of under-representation. For example, assume African-Americans make up 20% of a given community but only 10% of jurors. This represents an absolute disparity of 10% (20% - 10%), but a relative disparity of 50% (10 = 50% of 20). Thus, counsel must know both the relative and absolute disparity when pleading discrimination claims. Use of a professional statistician is almost always required in order to appropriately calculate and analyze data.

b. Discrimination in selection of grand jury foreman

Discrimination in the selection of a grand jury foreperson violates the Equal Protection Clause. Rose v. Mitchell, 443 U.S. 545 (1979). But if the foreperson's duties are not different from those of other grand jurors, and if the jury *as a whole* is representational, relief is not required. Hobby v. United States, 468 U.S. 339 (1984).

c. Discriminatory Use of Peremptory Challenges

Striking jurors peremptorily based on race or sex violates the Equal Protection Clause. Batson v. Kentucky, 476 U.S. 79 (1986).

d. Racial Animus Of Decision-Makers

If decision-makers in a given case are motivated by racial animus, a violation of Equal Protection arises for which relief is automatic. Thus, if a judge, juror, police officer, or other state actor made decisions which went indirectly or directly to charging, convicting, or sentencing, and which were a function of race, the judgment would have to be reversed. McCleskey v. Kemp, 481 U.S. 279, 292-93 (1987).

11. Trial in a prejudicial atmosphere

Pretrial publicity and/or questionable "security" precautions may make the trial process inherently unfair and violate due process. Holbrook v. Flynn, 475 U.S. 560 (1986); Sheppard v. Maxwell, 384 U.S. 333 (1966); Mayola v. Alabama, 623 F.2d 992, 997 (5th Cir. 1980).

If jurors state that they were affected by the publicity or presence of police, or if there is an unacceptable risk that impermissible forces came into play, relief is required. Woods v. Dugger, 923 F.2d 1454 (11th Cir. 1991)(large number of police and correctional officers in courtroom and large publicity). Overwhelming evidence of guilt does not render the violation harmless. Coleman v. Kemp, 778 F.2d 1487 (11th Cir. 1985).

12. Witherspoon error

Venirepersons cannot be struck from a death penalty case simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against it. Witherspoon v. Witt, 391 U.S. 510, 522 (1968). A venireperson may be struck only if the venireperson's views would prevent or substantially impair consideration of the death penalty. Wainwright v. Witt, 469 U.S. 412, 420 (1985). A violation of Witherspoon requires automatic reversal of a death sentence. Gray v. Mississippi, 481 U.S. 648 (1987).

A "reverse-Witherspoon" violation also requires relief. Morgan v. Illinois, 504 U.S. 415 (1992) (voir dire required on issue of juror's inability to consider life sentence).

13. Shackling

Handcuffing, shackling, or restraining defendant before conviction in such manner that a juror can see the restraint violates due process absent some essential state interest. Holbrook v. Flynn, 475 U.S. 560, 568-69 (1986). Jurors would presume guilt from such restraint. Also unconstitutional to shackle after conviction but during a capital sentencing proceeding. Elledge v. Dugger, 823 F.2d 1439, amended 833 F.2d 250 (11th Cir. 1987).

14. Cage error

Certain jury instructions are required by the constitution and their omission requires automatic reversal. A constitutionally insufficient reasonable doubt instruction violates Due Process and is never harmless. Sullivan v. Louisiana, 113 S.Ct. 2078 (1993); Victor v. Nebraska, 114 S.Ct. 1239 (1994); Cage v. Louisiana, 498 U.S. 39 (1990).

15. Lying during voir dire and jury misconduct

Proof that a juror lied during voir dire is quintessential extra-record evidence that, except in rare circumstances, will not be discovered until postconviction proceedings. McDonough Power Equipment Inc. v. Greenwood, 464 U.S. 548, 556 (1984); Burton v. Johnson, 948 F.2d 1150 (10th Cir. 1991); United States v. Scott, 864 F.2d 697, 699 (5th Cir. 1988).

Missouri cases of lying on voir dire or other juror misconduct: State v. Coy, 550 S.W.2d 940, 942 (Mo. App., K.C.D. 1977); State v. Post, 804 S.W.2d 862 (Mo. App., E.D. 1991).

16. Denial of tools to construct a defense

Defendants are entitled to an independent expert when the expert's assistance is crucial to defendant's ability to present a defense. Ake v. Oklahoma, 470 U.S. 68, 71 (1985).

Although Ake involved the right to an independent psychiatrist, other courts have extended Ake to provide for funding of an entire range of experts and investigators necessary to prepare and present a defense.

Ake did not address the question of prejudice. Most courts which have addressed this have reversed if Ake error was found, without conducting a harmless error analysis. Cowley v. Stricklin, 929 F.2d 640 (11th Cir. 1991); Korenbrock v. Scroggy, 919 F.2d 1091)(6th Cir. en banc 1991) but see Tuggle v. Netherland, 116 S.Ct. 283, 286 (1995)(Scalia, J., concurring)(remand appropriate to allow 4th Cir. to review case under harmless-error standard appropriate to collateral review).

The safer course is to plead prejudice, that is, there is at least a reasonable probability that the outcome of the proceedings would have been different if an expert had been provided.

Category II: If the movant shows a constitutional violation and some minimal quantum of prejudice, the court will grant relief.

1. The Knowing Use Of False Evidence

The deliberate deception of a court and jurors by the presentation of evidence known to be false violates the Fourteenth Amendment. The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected. Giglio v. United States, 405 U.S. 150 (1972). In other words, the State cannot create a materially false impression regarding the facts of the case or the credibility of the witnesses.

Prosecutor falsehoods alone do not automatically require reversal. Relief is required only if the false impressions are "material," which means when "there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." United States v. Agurs, 427 U.S. 97, 103 (1976); Napue v. Illinois, 360 U.S. 264 (1959); Routly v. Singletary, 33 F.3d 1279 (11th Cir. 1994); Campbell v. Reed, 594 F.2d 4 (4th Cir. 1979); Boone v. Paderick, 541 F.2d 441 (4th Cir. 1976). The record must suggest a reasonable likelihood that during deliberations the jurors could have considered the false evidence or argument. This does not entail an inquiry into whether the evidence might have made a difference in the outcome if it had not been considered.

2. Actual Conflict of Interest

When an attorney represents co-defendants and the court is alerted regarding a potential conflict but does nothing, relief is automatic because prejudice is presumed. See Category I claim above.

In order to prevail on a conflict of interest claim involving co-defendants under other circumstances, the movant must plead and prove (a) the existence of a conflict; and (b) that the conflict adversely affected counsel's performance. Cuyler v. Sullivan, 446 U.S. 335 (1980); United States v. Magini, 973 F.2d 261 (4th Cir. 1992). The Cuyler rule is not an per se rule of prejudice. Rather, prejudice is presumed only if the movant demonstrates that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected the lawyer's performance. Strickland v. Washington, 466 U.S. 668, 692 (1985). This inquiry is not an outcome determinative one but focuses upon what counsel did or did not do, ostensibly as a result of the conflict. See Burden v. Zant, 24 F.2d 1298 (11th Cir. 1994); Soia v. United States, 22 F.3d 766 (7th Cir. 1994).

In non-codefendant settings conflicts also arise, i.e., when an attorney's interests are related to or placed above the client's. Typical situations may include publicity or fees. The Cuyler "adverse effect" test applies to these types of conflicts. See Winkler v. Keans, 7 F.3d 304 (2nd Cir. 1993); but see Beets v. Scott, 65 F.3d 1258 (5th Cir. 1995)(adopting the Strickland prejudice standard).

Category III: If the movant shows a constitutional violation, the court will grant relief unless the State proves the error was harmless beyond a reasonable doubt.

1. The Chapman standard generally

In Chapman v. California, 386 U.S. 18 (1967), the Supreme Court adopted the general rule that a constitutional violation does not automatically require reversal of a state court judgment. Reversal is required unless the State can show beyond a reasonable doubt that the constitutional violation had no effect on the judgment. Arizona v. Fulminante, 499 U.S. 279, 296 (1991).

Chapman applies to many constitutional violations including: unconstitutionally over broad instructions at capital sentencing; jury instructions containing conclusive presumptions; improper trial comment on a defendant's silence; admission of involuntarily obtained confessions; admission of an out-of-court statement of a non-testifying co-defendant; restriction on cross-examination in violation of the Confrontation Clause; admission of identification evidence in violation of the Sixth Amendment right to counsel; other types of "trial error" that occurred during presentation of the case to the jury.

Chapman is applied on direct appeal, and until 1993, was applied in federal habeas corpus proceedings. In Brecht v. Abrahamson, 507 U.S. 619 (1993), the Supreme Court held that a different, more deferential [to state courts], standard of review should be applied to federal habeas corpus' treatment of state court constitutional violations. The following constitutional violations are frequently litigated in federal habeas proceedings and, before Brecht, were subject to the Chapman harmless-error analysis.

2. Massiah Claims

The prosecution deprives defendant of the Sixth Amendment right to counsel if an agent (police, marshals, jailers, bailiff, etc.) deliberately elicits incriminating statements after the right to counsel has attached. United States v. Henry, 477 U.S. 264 (1980); Massiah v. United States, 377 U.S. 201 (1964). Massiah claims are subject to harmless error analysis. Milton v. Wainwright, 407 U.S. 371 (1972).

3. Juror Claims

The Sixth Amendment guarantees trial by an impartial jury. Jurors may be tainted by misconduct, such as failing to reveal an interest in the case, visiting a crime scene, pressing extraneous evidence on other jurors. Jurors may be tainted by misconduct of court officers, attorneys, and others who attempt to influence the juror or who may pass along extraneous information. Jurors may be tainted through happenstance, when improper evidence is mistakenly sent to the jury room or when a juror realizes during the course of trial that the juror has some interest in the case.

Certain improprieties regarding jurors are per se prejudicial and require automatic reversal. See Category I claims above. For other claims, the prejudice standard is not entirely clear and Chapman is often used. United States v. Pessefall, 27 F.3d 511 (11th Cir. 1994)(extrinisic evidence considered by jurors); Stockton v. Virginia, 852 F.2d 740 (4th Cir. 1988)(extrajudicial contacts).

4. Right to testify

A defendant has a Fifth Amendment right to testify which cannot be waived by counsel or the court. Rock v. Arkansas, 483 U.S. 44 (1987). The right to testify is violated unless there is a knowing, voluntary, and intelligent waiver of the right. A violation of this right is subject to harmless error analysis. Jordon v. Hargett, 34 F.3d 310 (5th Cir. 1994).

5. Prior convictions and Johnson v. Mississippi

_____Generally, a death sentence based in part on a prior conviction which was subsequently reversed violates the Eighth Amendment. Allowing the jury to consider "materially inaccurate" evidence at sentencing of a capital trial creates an intolerable risk that the death sentence is unreliable. Johnson v. Mississippi, 486 U.S. 578 (1988).

It is unclear from Johnson what degree of harm a movant needs to show to obtain relief, although the opinion suggests that prejudice might be presumed. The safer course is to plead prejudice, that is, counsel should plead that there is at least a reasonable probability that the outcome of the proceeding would have been different if the materially inaccurate evidence had not been admitted at trial.

6. Confessions

A confession given involuntarily as the result of police action violates the Fourteenth Amendment. Colorado v. Connelly, 479 U.S. 157, 163 (1986). A confession taken after the right to counsel has attached, and without a knowing, intelligent and voluntary waiver of the right to counsel, violates the Sixth Amendment. Brewer v. Williams, 430 U.S. 387 (1977). A confession taken when a person is in custody without provision or waiver of Miranda warnings violates the Fifth, and perhaps the Sixth, Amendment. Thompson v. Keohane, 516 U.S. 99 (1995). Involuntary and Miranda impure confessions are subject to harmless error analysis. Arizona v. Fulminante, 499 U.S. 279 (1991).

Category IV: The court will grant relief if the movant shows constitutional error that had a substantial and injurious effect or influence in determining the jury's verdict.

In Brecht v. Abrahamson, 507 U.S. 619 (1993), the Supreme Court held that a new harmless error test would apply in federal habeas corpus proceedings which were previously governed by the Chapman standard. The Court held that the standard for determining whether habeas relief would be granted is whether the error had a substantial and injurious effect or influence in determining the jury's verdict.

Thus, if a state court has determined beyond a reasonable doubt that an error had no effect, a federal court will "defer" to that finding unless the federal court determines that the error in fact had a substantial effect. Brecht applies to "trial errors," and not to "structural errors." See Rose v. Peters, 36 F.3d 625, 634 n. 17 (7th Cir. 1994)(Batson violation is not a trial error subject to Brecht analysis).

Category V: The court will grant relief if the movant shows a constitutional violation and a reasonable probability that, but for the error, the result of the proceeding would have been different, where "reasonable probability" is defined as a probability sufficient to undermine confidence in the outcome.

1. Ineffective assistance of counsel -- Strickland

_____The movant must show (1) that counsel's performance fell below the standard of customary skill and diligence, i.e., that counsel's performance was unreasonable because counsel did something or failed to do something, **AND** that the movant was "prejudiced" as a result because there is a reasonable probability the outcome of the trial would have been different (had counsel not acted as he did or not failed to act),

2. Brady Claims

Where the State failed to disclose materially favorable evidence to guilt or sentencing to the defense before trial, a violation is made out regardless of whether the prosecutor knew of the evidence and regardless of whether the prosecutor acted in good faith. Kyles v. Whitley, 514

U.S. 419 (1995). Test is whether there is a reasonable probability that the undisclosed evidence, viewed as a whole, undermines confidence in the outcome of the proceedings.

Important Consideration for Brady Claims:

Even though Strickland and Brady have a similarly "hard-to-meet" showing of prejudice, it is my (Greg Mermelstein's) experience that Missouri's courts view Brady claims more favorably than Strickland claims. I personally believe that courts are more likely to give relief based on the State's failure to disclose evidence to the defense, than on ineffective assistance of counsel. See State v. Phillips, 940 S.W.2d 512 (Mo. banc 1997).

Therefore, I personally view Brady claims as having a somewhat easier burden of proof (in practice) than the authors of the federal habeas corpus manual believe.

IV. Examples From Actual Amended Motions

(In the examples, I have changed some of the names of witnesses and changed the client's name to "movant." In my actual motion, I use the movant's actual name.)

Example One: The following is an example of an entire Amended Motion using the format of "Form 40." The claim raised is ineffective assistance of counsel at a motion to suppress hearing. The claim incorporates a number of different principles discussed in preceding sections. Note that it includes legal analysis for the particular claims raised, and specific factual details regarding witnesses who were not investigate or called. Even though the claim combines various concepts, note how it is made clear what each witness will testify to. Note also how the standard of prejudice is modified, according to the Bonner case, to allow for an "easier-to-meet" standard of proof.

The examples herein are single-spaced to conserve paper, but double space your actual pleadings.

IN THE
CIRCUIT COURT OF BOONE COUNTY
STATE OF MISSOURI, DIVISION 1

STEPHEN MOVANT,	)	
	)	
Movant,	)	
	)	
vs.	)	No. 99CC12345
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

AMENDED RULE 29.15 MOTION
TO VACATE ROBBERY JUDGMENT AND SENTENCE

COMES NOW, Stephen Movant, movant, through undersigned counsel, and moves this Court for an order, pursuant to Missouri Supreme Court Rule 29.15, to set aside or correct the judgment of his first degree robbery conviction and sentence of life imprisonment in Boone County Case No. CR0199-9876. Movant requests that this matter be set for evidentiary hearing to resolve the factual matters that are not of record.

Reference Notations

Unless otherwise indicated, reference notations in this motion are to the legal file (L.F.) and transcript on appeal (Tr.) in State v. Stephen Movant, Missouri Supreme Court No. 88124.

MOTION TO VACATE, SET ASIDE OR CORRECT THE JUDGMENT OR SENTENCE

1. Place of detention:
Potosi Correctional Center

2. Name and location of court which imposed sentence:
Boone County Circuit Court, Columbia, MO

3. The case number and the offense or offenses for which sentence was imposed:
State v. Stephen Movant, Boone County Case No. CR0199-9876.
First Degree Robbery.

4. (a) The date upon which sentence was imposed and the terms of the sentence:
April 27, 1998
Life Imprisonment

(b) The date upon which you were delivered to the custody of the department of corrections to serve the sentence you wish to challenge:
April 27, 1998

5. The finding of guilty was made after a plea of not guilty.

6. Did you appeal from the judgment of conviction? Yes

7. If you answered "yes" to (6), list:

(a) the name of the court to which you appealed:
Missouri Supreme Court

(b) the result in such court and the date of such result:
Robbery conviction and sentence affirmed in State v. Stephen Movant, 999 S.W.2d 251 (Mo. banc 1999).

(c) the date the appellate court's mandate issued:
May 11, 1999

8. State concisely all the claims known to you for vacating, setting aside or correcting your conviction and sentence:

8(A) INEFFECTIVE ASSISTANCE OF COUNSEL -- FAILURE TO INVESTIGATE AND PRESENT EVIDENCE -- MOTION TO SUPPRESS STATEMENTS

Movant was denied effective assistance of counsel, in violation of his constitutional rights under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that his trial counsel failed to fully, completely and effectively litigate a Motion To Suppress Statements, and preserve this issue for appellate review. Counsel failed to investigate and present at the suppression hearing readily-available evidence by a psychiatrist, a police interrogation expert, and lay witnesses, which would have shown that movant's waiver of his Miranda rights and subsequent statements to police were not knowingly, intelligently and/or voluntarily made. Movant did not knowingly, intelligently and/or voluntarily waive his Miranda rights and make statements to police because of a combination of intoxication and its aftereffects; borderline to low intellectual functioning; impaired reality testing and disturbance of thinking; neuropsychological deficits; deficits in comprehension and registration of information; learning disability; and history of head injury. Because movant did not knowingly, intelligently and/or voluntarily waive his Miranda rights and make statements to police, the use of those statements at movant's trial violated his rights to silence and against self-incrimination, to due process, to a fair trial, and to effective assistance of counsel, under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a) and 19 of the Missouri Constitution.

A waiver of Miranda rights and a subsequent confession must be (1) knowing, (2) intelligent and (3) voluntary in order to be admissible at a trial. See State v. Bittick, 806 S.W.2d 652, 658 (Mo. banc 1991). This is a three-part test, and each prong of the test must be satisfied in order for a Miranda wavier to be valid and a subsequent statement admissible. See id.

The voluntariness inquiry focuses both on police conduct and on the characteristics of a particular defendant. See id. "[C]ertain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause of the Fourteenth Amendment." Miller v. Fenton, 474 U.S. 104, 109 (1985). This includes techniques using physical or psychological coercion. Id. Such coercive police activity renders a defendant's waiver of Miranda rights and subsequent confession involuntary under the Fifth and Fourteenth Amendments. Colorado v. Connelly, 479 U.S. 157, 167 and 170 (1986). With regard to the particular defendant, a "totality of circumstances test" is used to determine whether physical or psychological coercion was of such a degree that defendant's will was overborne at the time he waived his Miranda rights or confessed. See State v. Lytle, 715 S.W.2d 910, 915 (Mo. banc 1986). While no single factor is dispositive, factors to consider include such matters as a defendant's intelligence, lack of education, mental infirmity, or unusual susceptibility to coercion. Id.

The knowing and intelligent inquiry focuses on the particular defendant. State v. Bittick, 806 S.W.2d at 658. A "totality of circumstances test" is used to determine whether a Miranda waiver or confession were knowingly and intelligently made. Id. Factors to consider include matters such as a defendant's mental capacity, intoxication and its effects, and lack of education. Id.

Counsel are ineffective if they fail to exercise the customary skill and diligence of a reasonably competent counsel and the accused is prejudiced thereby. Strickland v. Washington, 466 U.S. 668, 687 (1984). At a suppression hearing, if the defense contends that a defendant's Miranda waiver or confession were not knowingly, intelligently or voluntarily made, it is incumbent upon the defense counsel to present the special circumstances or evidence to support this contention. See State v. Vinson, 854 S.W.2d 615, 625 (Mo. App., S.D. 1993). In determining whether counsel were ineffective in failing to adequately pursue a motion to suppress, the test is not whether a suppression motion would have been granted, but whether reasonable counsel under similar circumstances would have litigated the issues. Bonner v. State, 765 S.W.2d 286, 287 (Mo. App., W.D. 1988).

In movant's case, although counsel filed a Motion To Suppress Statements (L.F. 367-375) and presented some evidence at a Motion To Suppress Hearing, counsel were ineffective because they failed to fully investigate and present evidence to support their claim that movant's statements should be suppressed. At the suppression hearing, counsel failed to present any direct evidence that movant did not knowingly, intelligently and/or voluntarily waive his Miranda rights and make statements to police. Counsel's sole expert at the hearing was Dr. R. Lee Hoffman, a psychiatric pharmacist (Tr. 75), who was not permitted to directly address whether movant was able to knowingly, intelligently and voluntarily waive his rights and make statements because Dr. Hoffman was not a psychiatrist or psychologist (Tr. 80-82). Dr. Hoffman had not even been asked by counsel to investigate the Miranda-waiver and issues surrounding movant's statements, but had simply volunteered information to counsel on his own (Tr. 110-112). In fact, counsel failed to have any type expert investigate these matters. Counsel failed to investigate and present readily-available evidence to fully support a Motion To Suppress. Failure to interview witnesses or discover relevant, readily-available evidence relates to trial preparation and not trial strategy. Kenley v. Armontrout, 937 F.2d 1298, 1304 (8th Cir. 1991). Lack of diligence in preparation and investigation is not protected by a presumption in favor of counsel and cannot be justified as trial strategy. Id.

In movant's case, reasonable counsel under similar circumstances would have fully, completely and effectively investigated and presented evidence at the Motion To Suppress Hearing that movant did not knowingly, intelligently, and/or voluntarily waive his Miranda rights and make statements to police. Movant was prejudiced as a result. Bonner v. State, 765 S.W.2d at 287. Movant's counsel failed to:

(1) Investigate, present and call to testify Dr. Albert Donald, M.D., or a similarly-qualified psychiatrist-medical doctor, who would have testified at the Motion To Suppress Hearing to the results of a psychiatric-medical evaluation of movant. Dr. Donald, or a similarly-qualified psychiatrist-medical doctor, would have testified that he performed a psychiatric-medical evaluation on movant to evaluate whether movant knowingly, intelligently and voluntarily waived his Miranda rights and made statements to police. Dr. Donald, or a similarly-qualified psychiatrist-medical doctor, would have testified that movant's waiver of his Miranda rights and subsequent statements to police were not knowingly, intelligently and voluntarily made due primarily to a combination of drug intoxication and its aftereffects; impaired reality testing and disturbance of thinking; borderline to low intellectual functioning; learning deficits, including deficits in comprehension and registration of information;

neuropsychological deficits; and a history of head injury. Dr. Donald, or a similarly-qualified psychiatrist-medical doctor, would have testified that movant was secondarily impacted by Post-Traumatic Stress Disorder.

Movant's counsel failed to have any type of expert examine movant specifically to determine if movant was able to knowingly, intelligently and voluntarily waive his Miranda rights and make statements to police. Counsel knew that movant had a history of head injury, low academic achievement and learning disability, substance abuse, and neuropsychological problems. Additionally, counsel knew that movant had been using drugs and alcohol immediately prior to his interrogation by police, and that movant had reported to counsel that he experienced apparent hallucinations during his interrogation. All of this should have been red flags to counsel that examination by a psychiatrist-medical doctor was required in order to determine if movant's waiver of his Miranda rights and statements to police were knowing, intelligent and voluntary. Yet counsel totally failed to act. Movant was never seen by any medical doctor prior to his trial. Movant was prejudiced by counsel's failure to act because a psychiatric-medical evaluation would have provided direct evidence that movant did not knowingly, intelligently and/or voluntarily waive his Miranda rights and make statements to police.

(2) Investigate, present and call to testify Dr. Richard A. Lange, Ph.D., J.D., or a similarly-qualified expert in police interrogation techniques, who would have testified at the Motion To Suppress Hearing that modern police interrogation techniques are deliberately and intentionally designed to use psychological coercion, suggestion, deception, implied threats, and implied promises of leniency to overbear the will of criminal suspects and cause them to waive their Miranda rights and make statements to police; and that the police interrogation techniques used on movant were psychologically coercive, suggestive, deceptive, and involved implied threats and implied promises of leniency to overbear movant. Dr. Lange, or a similarly-qualified expert, would have testified that as a result of the police interrogation techniques used on movant, movant's waiver of his Miranda rights and subsequent statements to police were not voluntary.

Movant's counsel wanted to attack the voluntariness of movant's waiver of his Miranda rights and subsequent statements to police. Movant's counsel were aware of potential psychological coercion and deception in the police interrogation techniques used against movant because their Motion To Suppress complained, for example, that when police read movant his Miranda rights, police told him they were only investigating his involvement with a stolen car, and that police did not re-read movant his rights before questioning him about the murder (L.F. 367-370). Despite this knowledge, counsel failed to investigate and present evidence such as testimony by Dr. Lange that such techniques -- and others used in movant's case -- have been found by research to be psychologically coercive. Reasonable counsel under similar circumstances would not have failed to act. Movant was prejudiced because testimony by Dr. Lange, or a similarly-qualified expert, would have supported that movant did not voluntarily waive his Miranda rights and make statements to police.

(3) Subpoena, present and call to testify lay witnesses who were with movant on July 16, 1997, who would testify at the Motion To Suppress Hearing to movant's use of

drugs and alcohol that day and evening prior to his apprehension by police. Although counsel called one witness, Carl Nunn, who had witnessed movant use crack that night about 7:30-8:00 p.m. (Tr. 164), reasonable counsel under similar circumstances would have called additional lay witnesses who witnessed movant's substance use that day -- and in the days before then -- in order to further establish the extent of movant's crack-binge and other substance use. Counsel were aware through police reports, depositions or interviews, of several witnesses, including William Royal (L.F. 388) and Charles Hart, who would have testified to movant's drug and alcohol use in the days preceding July 16, 1997, and on that day. Counsel, however, failed to subpoena and call these witnesses at the Motion To Suppress Hearing. In fact, counsel did not even consider calling Royal or Hart at the suppression hearing. Movant was prejudiced because such testimony would have supported that Movant did not knowingly, intelligently and/or voluntarily waive his Miranda rights and make statements to police, because of the influence of intoxication and its aftereffects.

9(A) Movant will rely on the following witnesses and evidence in support of Claim 8(A):

(1) Albert Donald, M.D., 14 Tucker Blvd., Columbia, MO 65203. Dr. Donald, or a similarly-qualified psychiatrist-medical doctor, would have testified that he is a licensed psychiatrist-medical doctor in Missouri, and that he performed a psychiatric-medical evaluation on movant to evaluate whether movant knowingly, intelligently and voluntarily waived his Miranda rights and made statements to police. Dr. Donald, or a similarly-qualified psychiatrist-medical doctor, would have testified that:

(a) Movant's waiver of his Miranda rights and subsequent statements to police were not knowingly, intelligently and voluntarily made due primarily to a combination of drug intoxication and its aftereffects; impaired reality testing and disturbance of thinking; borderline to low intellectual functioning; learning deficits, including deficits in comprehension and registration of information; neuropsychological deficits; and a history of head injury. Movant was secondarily impacted by Post-Traumatic Stress Disorder.

(b) Throughout the day and evening of July 16, 1997, Movant had consumed crack cocaine, marijuana and alcohol. In the preceding days, movant had been on a crack binge, which continued into July 16. Movant's last use of crack was within an hour or so of his apprehension by police on the night of July 16. At the time movant was read his Miranda rights at 10:10 p.m. (Tr. 24-25), movant was experiencing substantial or acute intoxication effects from crack. At 4:30 a.m., when movant's videotaped statement was obtained and the interrogation ended (Tr. 42-43), movant was continuing to experience substantial aftereffects, or withdrawal effects, of crack use. Dr. Donald would have testified that the videotape of movant, for example, shows that movant was experiencing chills and psychomotor agitation at 4:30 a.m. -- both of which are diagnostic criteria for cocaine intoxication under the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV). Dr. Donald would have testified that since movant was still under these effects of crack at 4:30 a.m., it is medically reasonable to believe that he would have been under even more acute effects earlier that night at 10:10 p.m. Intoxication effects impaired movant's cognitive capacities; his ability to attend and concentrate; his ability to comprehend and register information; and his

ability to exercise rational intellect and judgment -- all of which are necessary to being able to make a knowing, intelligent and voluntary waiver of rights.

(c) During his interrogation by police, movant experienced impaired reality testing and a disturbance of thinking. This was due not only to crack intoxication and its aftereffects, but also due to other underlying disorders discussed below. For example, movant believed that, throughout his interrogation, police displayed on the interrogation room wall a huge photograph of the victim. In fact, police did not display any photographs (Tr. 62-63). Thus, movant was experiencing hallucinations during his interrogation.

(d) Movant has a documented history of polysubstance dependency and abuse. Movant began using alcohol and drugs at about age 14. Records from Central Missouri Mental Health Center show that at age 18, movant reported an addiction to barbiturates. Eventually, crack cocaine became movant's primary drug of addiction. Records from St. John's Medical Center in Kansas City show that in 1991 movant was seen at the hospital under substantial crack and alcohol intoxication. Movant's lengthy history of polysubstance abuse has diminished his cognitive capacities.

(e) Movant has borderline to low intellectual functioning, and a history of learning deficits, including deficits in comprehension and registration of information. From the time movant was a young child, movant exhibited signs of learning deficits. School records from Independence Public Schools in 1965 report that when Movant was in kindergarten, he was "far below average in every kindergarten area." Independence Public School records from both third and fourth grade report that movant was a "very slow learner." Pretrial WAIS-R and post-trial WAIS-III IQ tests place movant within the borderline to low range of intellectual functioning. All of this shows that movant's abilities to comprehend and register information are severely impaired. The ability to comprehend and register information is a necessary prerequisite to being able to make a knowing, intelligent and voluntary waiver of rights.

(f) Movant has significant neuropsychological deficits, as evidenced by recent Halstead-Reitan Test Battery results. These deficits diminish movant's cognitive capacities.

(g) Movant has a history of head injury. For example, in 1992, movant was hit in the back of his head with a shovel, resulting in a laceration and temporary blurred vision. In 1983, movant sustained a depressed skull fracture when he was hit in the head with the butt of a gun. Physical examination of the skull by Dr. Donald revealed depressions in the skull and lack of bone in the impacted areas. To this day, movant experiences post-concussive symptoms, including headaches and memory deficits. Movant's history of head injury has diminished his cognitive capacities.

(h) Movant has impaired reality testing and disturbance of thought. Movant experiences hypnogogic hallucinations; for example, he believes he hears his mother's voice calling to him. Movant also experiences night sweats during sleep, indicative of serious trauma. In clinical interviews, movant exhibits dissociation, tangentiality, circumstantiality, emotional lability, thought-blocking and push of speech -- all indicative of disturbance of thought.

(i) Movant suffers from Post-Traumatic Stress Disorder, or symptoms thereof. Movant's PTSD primarily arises out of his childhood experiences, in which he experienced or witnessed serious physical, emotional or sexual abuse of himself, his mother, or his sister (See, e.g., Tr. 1622-1631, 1653-1654, 1666). Symptoms of PTSD that impact on movant include recurrent and distressing thoughts and dreams; dissociation; impaired memory of trauma; difficulty concentrating; hypervigilence; and exaggerated startle or fear response.

Finally, Dr. Donald will testify in this Rule 29.15 action that he was ready, willing and able to conduct the above-described psychiatric-medical evaluation of movant prior to trial if he had been contacted by defense counsel, and that he would have testified to the results of his evaluation, had he been called to testify

(2) Richard A. Lange, Ph.D., J.D., 12 Science Bldg., University of Missouri, Columbia, MO 65211. Dr. Lange, or a similarly-qualified expert, would have testified that he is an Assistant Professor of Criminology, Law and Society at the University of Missouri, and that one of his principal areas of research and publication is police interrogation techniques. Dr. Lange, or a similarly-qualified expert, would have testified that:

(a) Modern police interrogation techniques are deliberately and intentionally designed to use psychological coercion, suggestion, deception, implied threats, and implied promises of leniency to overbear the will of criminal suspects and cause them to waive their Miranda rights and make statements to police.

(b) Modern interrogation techniques strive to neutralize a person's resistance by convincing him that he is caught and that the marginal benefits of confessing outweigh the marginal costs. Modern interrogation techniques are designed to be psychologically coercive. Psychological interrogation techniques are designed to limit a person's attention to certain issues, manipulate his perceptions of his present situation, and bias his evaluation of the choices before him. Police elicit confessions from persons by leading them to believe that the evidence against them is overwhelming, that their fate is certain whether or not they confess, and that there are advantages that follow if they confess.

(c) Once police identify a likely suspect, they often conduct what appears to be an interview, which is designed to appear non-threatening and information-gathering. By using an interview format, the police attempt to develop a rapport with the suspect and to initially define their interaction as an exchange between persons involved in a cooperative effort to solve crime. Even after the interrogation later turns openly accusatorial, the police are advantaged by this rapport by claiming to the suspect that they understand what led the suspect to commit the crime, and that they do not think badly of him despite his guilt. By building an initial rapport with the suspect, the police facilitate the suspect's later decision to say "I did it" and confess.

(d) Research shows that neither an innocent nor guilty party is likely to appreciate the significance of Miranda warnings. Miranda warnings are often presented in a perfunctory manner that actively de-emphasizes the significance and implications of Miranda,

and suggests that Miranda rights are something unimportant or to be ignored. Even after Miranda warnings are given, the interrogator may continue to use a non-threatening interview format to question the suspect to continue to build rapport, before turning accusatorial.

(e) The objective of modern interrogation techniques is to overcome a suspect's denials, neutralize his resistance to making an admission, obtain an admission, and then to elicit a confession that describes why and how the crime was committed. To accomplish these goals, police focus the suspect's attention and efforts on convincing him that the case against him is airtight. The police accomplish this by repeatedly accusing the suspect of committing the crime; by exuding confidence in his guilt; by pointing out implausibility in the suspect's account; and most importantly, by confronting the suspect with alleged incontrovertible evidence of guilt. The strategy is to lead a suspect to believe that he has been caught and that admitting guilt does no real harm. The next step in the interrogation is to motivate a now resigned and despairing suspect to admit guilt When an interrogator judges the suspect to be at a low point, he offers the suspect incentives to motive him to re-evaluate his decision to deny responsibility for the crime. The strategy is to make a suspect believe that he will be better off if he admits guilt than if he continues with denying it. A common technique at this point is "the accident scenario technique," also known as "maximization/minimization." This includes suggesting to the suspect a version of the crime that drastically lowers the legal seriousness of the offense and the appropriate charge. For example, if the crime is murder, the facts can be recast to make it appear that the crime was accidental. This tactic is effective at eliciting admissions for the same reasons that more explicit promises of prosecutorial leniency work: because the interrogator implicitly communicates that the suspect will receive a reduced level of punishment if he admits to a description of the crime that the interrogator finds acceptable. By framing a suspect's alternatives as admitting to either a premeditated crime or an accident, a suspect will be led to believe that admitting to a lower level of offense will be less severely punished. Police are aware that explicit promises of leniency and threats of harsher punishment are prohibited, so police communicate promises and/or threats more subtly. Despite its subtlety, the psychologically coercive effect of "the accident scenario technique" is very real.

(f) Interrogators may manipulate a suspect's feelings of remorse or emotion by leading him to believe that he will feel better if he confesses.

(g) The police interrogation techniques used in movant's case mirrored many of these modern, psychologically coercive methods. For example, when movant was first apprehended, he was read his Miranda rights and then told by police that they were investigating a stolen car (Tr. 25-26). This was an apparent "interview" portion of the interrogation. When the interrogation later shifted to the murder and turned accusatorial, police did not re-read movant his Miranda rights (Tr. 57), thereby minimizing their importance. Police then sought to induce a sense in movant that he was "caught" and that admitting guilt would do no real harm by confronting him and telling him that police thought blood on his shoes would match the victim's (Tr. 31-32). Police then engaged in a classic "accident scenario technique" by telling movant that they did not believe he intended to kill the victim, but that it was a burglary gone bad (Tr. 33-34). This was an implied promise to movant that he would receive a reduced level of punishment if he admitted to this scenario, and it induced movant's acknowledgments and subsequent statements to police; conversely, this was an implied threat that if movant did not

admit to this scenario, he would be punished more harshly because police knew he was guilty anyway. Thus, the police interrogation techniques used on movant were psychologically coercive, suggestive, deceptive, and involved implied threats and implied promises of leniency to overbear movant. For all these reasons, movant's waiver of his Miranda rights and subsequent statements to police were not voluntary.

Finally, Dr. Lange will testify in this Rule 29.15 action that he was ready, willing and able to present the above-described testimony prior to trial if he had been contacted by defense counsel, and if he had been called to testify.

(3) (a) **William Royal**, Fulton Reception and Diagnostic Center, Inmate No. 772661, Fulton, Mo. Royal would have testified at trial that on the days leading up to the date of movant's arrest, and on the day of movant's arrest, Royal witnessed movant get "high" on crack "probably" more than 20 times. Additionally, Royal will testify in this Rule 29.15 action that he would have been ready and available to testify at trial if he had been contacted and subpoenaed by counsel, but that he was not contacted or called to testify.

(b) **Charles Hart**, Boone County Jail, Columbia, Mo. Hart would have testified at trial that on July 16, 1997, Hart had used crack with movant five to ten times; that Movant would smoke crack for hours at a time; that movant became "raggedy" in his appearance due to crack use; and that on July 16, 1997, movant's "eyes were like headlights, [and] he had lost weight" due to crack use. Additionally, Hart will testify in this Rule 29.15 action that he would have been ready and available to testify at trial if he had been contacted and subpoenaed by counsel, but that he was not contacted or called to testify.

(4) **John Doe and Sally Jones, Capital Unit, 3402 Buttonwood, Columbia, MO 65201.** Doe and Jones will testify that they represented movant at trial. Doe and Jones will testify that they did not have any type of expert investigate whether movant was able to knowingly, intelligently and voluntarily waive his Miranda rights and make his statements to police, and that this failure to investigate was not trial strategy since counsel wanted to have movant's statements suppressed. Counsel will testify that they knew that movant had a history of low academic achievement, learning disability, substance abuse, and head injury, but that they did not have movant evaluated by a psychiatrist-medical doctor because they did not consider or recognize the need or value for such an evaluation. Nor did counsel consider or recognize the need or value of a police interrogation expert in showing why the police techniques used to interrogate movant rendered his Miranda waiver and statements involuntary. Finally, counsel will testify that their failure to call William Royal and Charles Hart to testify at the suppression hearing was because they did not consider doing this and failed to recognize the value of their testimony at the suppression hearing, and that the failure to call them was not trial strategy.

10. Prior to this motion have you filed with respect to this conviction:

(a) Any motion to vacate judgment under Missouri Supreme Court rule 24.035, 27.26 or 29.15?

No.

(b) Any petitions in state or federal courts for habeas corpus?
No.

(c) Any petitions in the United States Supreme Court for certiorari?
No.

(d) Any other petitions, motions or applications in this or any other court?
No.

11. If you answered "yes" to any part of (10), list with respect to each petition, motion or application:

(a) the specific nature thereof:
N/A

(b) the name and location of the court in which each was filed:
N/A

(c) the disposition thereof and the date of such disposition:
N/A

(d) if known, citations of any written opinions or orders pursuant to each such disposition:

N/A

12. Has any claim set forth in (8) been previously presented to this or any other court, state or federal, in any petition, motion or application you have filed?
No.

13. If you answered "yes" to (12), identify:

(a) the claims that have been previously presented:
N/A

(b) the proceedings in which each claim was raised:
N/A

14. If you have filed prior proceedings in any state or federal court involving this same sentence but did not raise therein one or more of the claims you now list in (8), state which were not raised in the earlier proceedings and why they were not raised in those proceedings:
N/A

15. Where you represented by an attorney in the course of (a) your preliminary hearing; (b) your arraignment and plea; (c) your trial, if any; (d) your sentencing; (e) your appeal, if any, from the judgment of conviction or the imposition of sentence?
Yes.

16. If you answered "yes" to one of more of part (15), list (a) the name and address of each attorney who represented you; and (b) the proceedings at which each such attorney represented you:

i. John Doe and Sally Jones, Central Capital Unit, 3402 Buttonwood, Columbia, MO 65201, represented movant in pretrial, trial and sentencing proceedings.

ii. Robert Boxwell, State Public Defender, 3402 Buttonwood, Columbia, MO 65201, represented movant on direct appeal to the Missouri Supreme Court.

17. Are you under sentence from any other court that you have not challenged? No.

18. Movant has already been allowed to proceed in forma pauperis by previous order of this Court.

WHEREFORE, Stephen Movant, the movant, respectfully requests that he be granted an evidentiary hearing in this case; that the Court grant this Motion under Missouri Supreme Court Rule 29.15; that his conviction and sentence for first degree robbery be set aside; and that the Court grant him a new trial on his charge of first degree robbery.

Respectfully submitted,

_____

J. Gregory Mermelstein, MOBar# 33836
Attorney for Movant
3402 Buttonwood
Columbia, Missouri 65201-3724
(573) 882-9855

CERTIFICATE OF SERVICE

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Example Two: Here is a claim that combines ineffective assistance of counsel with claims regarding presentation of false evidence and a Brady claim.

8(B) INEFFECTIVE ASSISTANCE OF COUNSEL -- PROSECUTORIAL MISCONDUCT -- FALSE AND MISLEADING EVIDENCE -- "BRADY VIOLATION"

Movant was denied effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution in that his trial attorneys failed to investigate and call in guilt phase Officers Lonnie Marx and John Wall, who had interviewed Lane Gregory regarding the date he saw the victims in his market; re-call in guilt phase Officer Richard Sea to testify to the date Gregory told him he last saw the victims; and introduce in guilt phase into evidence Ex. A, the report of Sea of his interview with Gregory.

In the defense portion of trial, defense counsel called Lane Gregory in order to have him testify that he had seen the victims alive after early Thursday morning, February 20, 1997, the time the State alleged the victims were killed. Gregory testified, however, that that he was not sure when he saw the victims and he could have seen them as early as Wednesday (Tr. 1896). It was critical to the defense to show that the victims were alive after early Thursday morning, and reasonable counsel would have sought to impeach Gregory with his prior inconsistent statements that he saw the victims on Friday, February 21, and would have sought to place those prior inconsistent statements before the jury. See Section 491.074 RSMo. Counsel, however, failed to act.

Marx and Wall could have been located through reasonable investigation because there were pretrial police reports on them. Marx and Wall would have testified if they had been subpoenaed and called by counsel, and their testimony would have provided a viable defense. Counsel failed to investigate and call Marx and Wall to testify. Counsel knew or should have known of them because there was a pretrial police report on them. Counsel, however, failed to act. This failure was not trial strategy. Marx and Wall would have testified that they interviewed Lane Gregory on February 24, 1997, and that he said that he saw the victims in his meat market on Friday, February 21.

Sea was called to testify by the State in guilt phase. On cross-examination of Sea, counsel had Sea identify his police report regarding his interview with Lane Gregory, but counsel did **not** ask about its specific contents or admit it into evidence (Tr. 838; Ex. A). At trial, Gregory testified he did not tell police he saw the victims on Friday (Tr. 1895). When Gregory testified inconsistently with the police report (Tr. 1985), reasonable counsel would have re-called Sea in guilt phase to testify. If recalled, Sea would have testified that he interviewed Gregory on February 25, 1997, and Gregory told Sea that he saw the victims in his meat market on Friday, February 21. It was highly prejudicial to movant that counsel did not recall Sea, offer Ex. A into evidence, or ask about its contents because **during jury deliberations, the jury specifically requested to see Ex. A, but were instructed that they could not because it was never admitted into evidence** (Tr. 2035; Tr. 838, Ex. A). Obviously, the jury wanted to know if Gregory had told police that he had seen the victims on Friday. In fact, Gregory had said this in two separate interviews with police closest in time to the actual events. Reasonable counsel under similar circumstances clearly would have wanted the jury to know this information. Movant was prejudiced because there is a reasonable probability that the result of his guilt phase

would have been different had counsel not failed to act. See Hadley v. Groose, 97 F.3d 1131, 1136 (8th Cir. 1996) (counsel's handling of testimony that conflicted with police report constituted ineffective assistance).

Additionally, movant was denied his rights to a fair trial, to due process and freedom from cruel and unusual punishment in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a) and 21 of the Missouri Constitution, because of prosecutorial misconduct during the questioning of witness Gregory. During defense counsel's questioning of Gregory, counsel asked Gregory:

> Q. And do you recall initially what day you told police that you thought the victims had been in your store when you were *first interviewed*?
>
> A. I think that was the day I found out -- one of them come in and talked to me on that Saturday.
>
> Q. Right. But do you remember what day you told the officers during your first interview that you had seen the victims?
>
> A. No, I do not.
>
> Q. Is it possible that you told them on *Friday*?
>
> A. No, ma'am.
>
> PROSECUTOR: *I object to that. It's calling for speculation.* (Tr. 1895) (emphasis added).

The Court did not rule on the objection (Tr. 1985). However, the prosecutor's objection in the hearing of the jury was highly prejudicial to movant because it left the false and misleading impression with the jury that Gregory had not told police in his first interview that he had seen the victims on Friday. The prosecutor knew that Gregory had, in fact, said in two separate interviews when first contacted by police that he saw the victims on Friday. The prosecutor had police reports from Officers Marx, Wall and Sea stating this. By objecting and stating that this was "speculation," the prosecutor left the false and misleading impression with the jury that Gregory had not said this. This violates due process and constituted prosecutorial misconduct. See Giglio v. United States, 405 U.S. 150 (1972); Napue v. Illinois, 360 U.S. 264 (1959). During jury deliberations, the jury specifically asked to see the police report of Gregory's interview by police, but were told they could not because it was never admitted into evidence (Tr. 2035; Tr. 838, Ex. A). Clearly, the jury wanted to know if Gregory told police he saw the victims on Friday. The prosecutor's objection left the false and misleading impression with jurors that this was only "speculation," when the prosecutor knew it was true.

Additionally, and alternatively, movant was denied his rights to a fair trial, to due process and to be free from cruel and unusual punishment in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a) and 21 of the Missouri Constitution, because the State failed to disclose a police report dated November 16, 1998, in which police re-interviewed Gregory at the prosecutor's request and Gregory stated, for the first time, that it "could have been Wednesday, Thursday or Friday" that he saw the victims because Gregory now thought he had been in Illinois on Tuesday, not Wednesday. The State was required to disclose this police report to the defense. Brady v. Maryland, 373 U.S. 83, 87 (1963); Rules 25.03 and 25.04, V.A.M.R. Movant was prejudiced because defense counsel had no opportunity to investigate or prepare to meet this new information, and the information undermines confidence in the result of movant's trial.

9(B) Movant will rely on the following witnesses and evidence in support of Claim 8(B):

1. Lonnie Marx, Boone County Sheriff's Department, Columbia, MO and John Wall, Columbia Police Department, Columbia, MO., and their police reports. Marx and Wall will testify that they interviewed Lane Gregory on February 24, 1997, and that he said that he saw the victims in his meat market on Friday, February 21. Marx and Wall will further testify in this Rule 29.15 action that they would have been ready and available to testify had they been subpoenaed to testify at movant's trial; that they were not contacted by trial counsel; and that trial counsel did not call them to testify.

2. Richard Sea, Missouri State Highway Patrol, Jefferson City, MO., and his police report (Ex. A at trial). Sea will testify that he interviewed Gregory on February 25, 1997, and Gregory told Sea that he saw the victims in his meat market on Friday, February 21. Sea will further testify that he would have been ready and available to testify to this information had he been subpoenaed and re-called to testify by trial counsel, but that counsel did not re-call him. Sea will further testify that, at Prosecutor Steve Case's request, he re-interviewed Gregory and produced a report of that interview on November 16, 1998.

3. Steve Case, Boone County Prosecutor's Office, Columbia, MO., who will testify that prior to trial, he had police reports from Officers Marx, Wall and Sea showing that when Gregory was first interviewed, Gregory told them he saw the victims on Friday, February 21.

4. Police Report of Richard Sea, dated November 16, 1998, which states that on that date, at Prosecutor Case's request, Sea re-interviewed Gregory; asked if "he was absolutely sure he had been in Illinois on the Wednesday before" the murders, and Gregory "thought for a minute and then said, 'No, I returned on Tuesday night. So the victim could have been in Wednesday, Thursday, or Friday. I'm not sure.'"

5. John Doe and Mary Smith, 3402 Buttonwood, Columbia, MO 65201, who will testify that they overlooked calling Officers Marx, Wall and Sea and introducing into evidence Ex. A, and that their failure was not trial strategy. Additionally, they will testify that the defense was not disclosed Richard Sea's report dated November 16, 1998.

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Example 3: Here is an excerpt from a long claim of trial counsel ineffectiveness for failing to object to closing argument. Note how the claim includes an introduction with legal analysis in it, followed by specific examples.

8(C) INEFFECTIVE ASSISTANCE OF COUNSEL -- CLOSING ARGUMENTS -- FAILURE TO OBJECT AND PRESERVE FOR APPEAL

Movant was denied effective assistance of counsel, a fair trial, due process and equal protection of law and was subjected to cruel and unusual punishment in violation of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 10, 18(a) and 21 of the Missouri Constitution in that counsel failed to object, request appropriate relief, properly preserve for appellate review, and prevent the introduction of irrelevant, improper, inadmissible, prejudicial and inflammatory statements and arguments during the guilt and penalty phases of movant's trial. Counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would have exercised under similar circumstances. Movant was prejudiced as a result, in that had counsel not been ineffective, there is a reasonable probability that the outcome of movant's guilt or penalty phases would have been different. That is, that movant would not have been convicted of first degree murder in guilt phase, or would not have been sentenced to death in penalty phase. Counsel's failures and omissions, both individually and cumulatively, including but not limited to those listed below, resulted in movant being denied a fair trial and due process and subjected him to cruel and unusual punishment.

Argument in capital cases must receive a higher degree of scrutiny than in non-capital cases. Caldwell v. Mississippi, 472 U.S. 320, 329 (1985). Because of the qualitative difference between the death penalty and other penalties, the Eighth and Fourteenth Amendments require a heightened degree of reliability whenever a death sentence is imposed. Lockett v. Ohio, 438 U.S. 586, 604 (1978). The State's closing arguments in the guilt and penalty phases of movant's trial denied movant his rights to a fair trial, due process and equal protection of law, and freedom from cruel and unusual punishment as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 10, 18(a) and 21 of the Missouri Constitution.

Counsel are ineffective if they fail to object to objectionable statements and argument and movant is prejudiced as a result. State v. Storey, 901 S.W.2d 886, 900-03 (Mo. banc 1995). Movant's counsel failed to object to objectionable statements and argument, and movant was prejudiced in that, had counsel not been ineffective, there is a reasonable probability that the outcome of movant's guilt or penalty phases would have been different, and that movant would not have been convicted of first degree murder in guilt phase or sentenced to death in penalty phase.

Movant's counsel failed to:

1. Object to the prosecutor's closing argument in guilt phase that movant was driving a truck that hadn't been licensed or registered for two years (Tr. 1948). This was outside the evidence. Additionally, it was unduly prejudicial because it implied that movant was guilty of the murders because he committed the prior bad or illegal act of not registering or licensing his truck. State v. Storey, 901 S.W.2d at 900-01; State v. Raspberry, 452 S.W.2d 169, 172 (Mo. 1970).

2. Object to the prosecutor's closing argument that movant spent "virtually every night drinking" (Tr. 1948). This misstated the evidence, was outside the evidence, and was prejudicial because it implied that movant was guilty based on his bad conduct in drinking. State v. Storey, 901 S.W.2d at 900-01.

3. Object to the prosecutor's closing that movant "had a drug habit. He couldn't afford his lifestyle. He was always broke. And he needed money on or by February 20, 1997" (Tr. 1948). It is highly prejudicial, fundamentally unfair, and a violation of due process to argue movant's poverty or need for money as evidence of guilt for the robbery and murder of the victims. See United States v. Mitchell, 172 F.3d 1104 (9th Cir. 1999). Additionally, it was improper and prejudicial to argue movant's drug use because this implied that movant should be convicted based on his bad or illegal conduct in using drugs. State v. Raspberry, 452 S.W.2d at 172.

4. Object to the prosecutor's closing that "I want to apologize for [state's witness Jean Carr]. I sure wish that when [movant] had decided he needed a girl to go help him with this robbery plan, I wish he'd gone down to the Sunday School to get her because she sure would have made a better witness. But you know what, that isn't where you get people to go help you with robberies. You don't go to church....You find people who do drugs, you find people who drink, who hang out in bars. You find people who wouldn't be believed if they talk. You find people who can be intimidated. You find people who might fool around. You find somebody living on the seamy, underbelly of life" (Tr. 1951). These remarks were improper and movant was prejudiced because these remarks were speculative, unsupported by the evidence, constituted facts outside the record, constituted a testimony by the prosecutor and personal opinion by him, and improperly vouched for and bolstered the credibility of Carr and her version of events. State v. Storey, 901 S.W.2d at 900-01; United States v. Francis, 170 F.3d 546, 550-51 (6th Cir. 1999).

9(C) Movant will rely on the following witnesses and evidence in support of Claim 8(C):

1. John Doe and Sally Smith, 3402 Buttonwood, Columbia, MO. 65201, who will testify that they represented movant at trial; that they did not recognize the objectionable nature of the statements and arguments made by the State; and that they had no strategic reason for failing to object or request other appropriate relief.

2. The legal file and transcript in State v. Movant, Boone County No. CR123-468.

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Example Four: Here is an example from an ineffective assistance of appellate counsel claim. Note the introductory paragraph followed by a list of specific claims. Page references are to where matters occurred at trial or are listed in the New Trial Motion.

8(D) INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

Movant was denied effective assistance of appellate counsel, due process and equal protection of law and was subjected to cruel and unusual punishment in violation of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 10, 18(a) and 21 of the Missouri Constitution in that appellate counsel failed to properly raise on appeal numerous meritorious issues which would have resulted in movant being granted a new trial, or a new penalty phase trial. See Roe v. Delo, 160 F.3d 416 (8th Cir. 1998) (failure to raise viable issues on appeal constitutes ineffective assistance of counsel).

Appellate counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would have exercised under similar circumstances. Movant was prejudiced as a result, in that had counsel not been ineffective, there is a reasonable probability that the outcome of movant's appeal would have been different. That is, movant would have been granted a new trial, or a new penalty phase trial. Appellate counsel's failures and omissions, both individually and cumulatively, including but not limited to those listed below, resulted in movant being denied due process and subjected him to cruel and unusual punishment.

Appellate counsel, to movant's prejudice, failed to:

1. Appeal that the quality of the evidence of guilt in movant's case was insufficient to support a death sentence. The evidence against movant consisted of a single eyewitness, Jane Smith, a woman of questionable credibility, and a "jail-house snitch," Peter Bennett, also a person of questionable credibility. There was no physical evidence connecting movant to the murders. Because death is different than non-capital sentences, the Eighth and Fourteenth Amendments require a heightened need for reliability in determining a death sentence. Woodson v. North Carolina, 428 U.S. 280, 305 (1976). Section 565.035.3(3) RSMo. also requires an assessment of the "strength of the evidence" in determining whether a death sentence may be upheld. See State v. Chaney, 967 S.W.2d 47 (Mo. banc 1998). Appellate counsel failed to appeal that the evidence in movant's case was unreliable and insufficient to support a death sentence. Reasonable counsel under similar circumstances would not have failed to act.

2. Appeal the trial court's overruling of the defense objection to the prosecutor's closing argument, "Jane Smith came here and, as I [the prosecutor] said, you don't have to like her, but she told the truth" (Tr. 2029; L.F. 509). Such remarks were improper and prejudiced movant because they constituted personal vouching and expressions of opinion by the prosecutor for the veracity of Jane Smith. State v. Storey, 901 S.W.2d 886, 900-01 (Mo. banc 1995); United States v. Francis, 170 F.3d 546, 550-51 (6th Cir. 1999).

3. Appeal the trial court's overruling of defense counsel's objections to Instructions MAI 313.40, 34 and 39, because paragraphs 2 (whether the purpose was to receive monetary value or anything of value) and 3 (whether the murders were committed during a robbery) were duplicative, and paragraph 4 is not supported by the evidence since, at the time of the homicides, there was no "pending investigation" (Tr. 2041-2043; L.F. 503).

Use of duplicative aggravators skews the weighing process of aggravators and mitigators, and creates an unconstitutional risk that death was imposed arbitrarily. See United States v.

McCullah, 76 F.3d 1087, 1111-12 (10th Cir. 1996). Movant notes that the Missouri Supreme Court has rejected claims of duplicative aggravators, State v. McMillin, 783 S.W.2d 82, 104 (Mo. banc 1990), but appellate counsel should have raised this matter to preserve it for federal review.

As for the "pending investigation" aggravator, it was not applicable because no investigation was pending at the time of death. State v. Todd, 805 S.W.2d 204 (Mo. App., W.D. 1991). Finding this aggravator when no investigation was pending rendered the death sentence unreliable. Id.; Woodson v. North Carolina, 428 U.S. at 305.

4. Appeal the trial court's refusal of proposed defense Instruction D on victim-impact evidence (Tr. 2042-2043; L.F. 503-504). The instruction was necessary to guide the jury's discretion in considering victim-impact evidence. A capital sentencing scheme must provide guided discretion so as to ensure reliability and minimize the risk of arbitrary and capricious action. See Gregg v. Georgia, 428 U.S. 153, 188-189 (1976); Woodson v. North Carolina, 428 U.S. 280, 305 (1976). The presentation of victim-impact evidence without an instruction to guide the jury's discretion resulted in the arbitrary and capricious infliction of the death penalty.

5. Appeal the trial court's overruling of defense counsel's objection to the prosecutor's closing argument that there has never been any sign that movant had any remorse for what he did, and overruling counsel's motion in limine to exclude argument about lack of remorse (Tr. 2123; L.F. 511, 496). Such remarks are improper and prejudicial because they infringed on movant's rights not to testify and to silence, to due process and freedom from cruel and unusual punishment as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), 19 and 21 of the Missouri Constitution. Owen v. State, 656 S.W.2d 458 (Tex.Crim.App. 1983); State v. Endicott, 732 S.W.2d 239 (Mo. App. 1987) (Article I, Section 19 of the Missouri Constitution prohibits not only comments on the failure of defendant to testify but also comments which have the affect of compelling a defendant to testify).

6. Appeal the trial court's failure to strike for cause venireperson Ziegs, who stated on voir dire that he would be inclined to automatically impose the death penalty upon a finding of guilty of first degree murder, and that he could not give full consideration to mitigating circumstances (Tr. 674-677). Although Ziegs later stated that he would consider a life sentence (Tr. 677), the totality of his responses indicated that he was inclined to automatically impose the death penalty (Tr. 674-677). Such venirepersons are not qualified to serve and must be struck for cause. Morgan v. Illinois, 504 U.S. 719, 728-29 (1992). Defense counsel moved to strike Ziegs for cause, but the trial court overruled the motion (Tr. 690). Counsel preserved this issue in their New Trial Motion (L.F. 503). The trial court erred in not striking Ziegs. Reasonable appellate counsel under similar circumstances would have raised this issue on appeal.

9(D) Movant will rely on the following witnesses and evidence in support of Claim 8(D):

1. Robert Boxwell, 3402 Buttonwood, Columbia, MO 65201. Boxwell will testify that he represented movant on appeal, and overlooked or failed to recognize the merit of the issues in corresponding Paragraph 8(D), and that his failure to raise these matters was not appellate strategy.

2. The briefs on appeal in State v. Movant, Missouri Supreme Court Appeal No. 81222.

3. The transcript and legal file in State v. Movant, Boone County Case No. CR112-6675.

END